Supreme Court, U. S.
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80-910

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. _____

CALAVO GROWERS OF CALIFORNIA,

Petitioner,

v.

GENERALI BELGIUM; COMPAGNIE D'ASSURANCES MARITIMES AERIENNES et TERRESTRES; DEUTSCHE VERSICHERUNGS-GESELLSCHAFT IN BREMEN; BLACK SEA and BALTIC GENERAL INSURANCE COMPANY LIMITED; ASSURANTIE VAN de BELGISCHE BOERENBOND; GENERAL ACCIDENT FIRE and LIFE ASSURANCE CORPORATION LIMITED; GROEP JOSI; MERCATOR; DE STER (L'ETOILE); FIDELITAS; L'EUROPEENE; LA SECURITE BELGE; NAVIGA; COMPAGNIE EUROPEENE D'ASSURANCES INDUSTRIELLES (C.E.A.I.); BELGAMAR; ASSUBEL; ASSURANCES GENERALES; and LA ROYALE BELGE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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November 3, 1980

Questions Presented for Review

1. Did the Court of Appeals misapply the forum non conveniens doctrine by conditionally affirming the dismissal of petitioner's complaint where:

(a) petitioner, a United States corporation, authorized to do business in New York, is relegated to pursue its claims in a foreign court of questionable jurisdiction, which court has limited discovery and can afford only declaratory relief and not the monetary relief petitioner seeks by this action;

(b) respondents, a syndicate of foreign underwriters, have systematically engaged in the practice of (i) providing insurance to United States corporations, (ii) fraudulently and improperly rejecting all claims filed under those policies, and (iii) invoking the doctrine of forum non conveniens so as to evade responsibility under the policies;

(c) substantial contacts with New York and the compelling interests of New York in providing its residents with a means of legal recourse against foreign insurers, as evidenced by its special insurance legislation, require the application of New York law in this forum; and

(d) a majority of the witnesses and the documentary evidence necessary to the trial of this action are located in New York and are subject to compulsory process here but not in the foreign forum?

2. Should this Court resolve the conflict among the circuits and the confusion within the Second Circuit created by the opinion of the Court of Appeals in this case?

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No.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

To the Justices of the Supreme Court of the United States:

Petitioner Calavo Growers of California respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the

Second Circuit conditionally affirming the dismissal of petitioner's complaint by the United States District Court for the Southern District of New York.

Opinions Below

The opinion of the Court of Appeals is not reported and is set forth in Appendix A, infra at A-1, et seq. The opinion of the District Court is not reported and is set forth in Appendix B, infra at A-23, et seq.

Jurisdiction

The judgment of the Court of Appeals was entered and filed on August 4, 1980, and thereafter modified by an order dated September 5, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented for Review

1. Did the Court of Appeals misapply the forum non conveniens doctrine by conditionally affirming the dismissal of petitioner's complaint where:

(a) petitioner, a United States corporation, authorized to do business in New York, is relegated to pursue its claims in a foreign court of questionable jurisdiction, which court has limited discovery and can afford only declaratory relief and not the monetary relief petitioner seeks by this action;

(b) respondents, a syndicate of foreign underwriters, have systematically engaged in the practice of (i) providing insurance to United States corporations, (ii) fraudulently and improperly rejecting all claims filed under those policies, and (iii) invoking the doctrine of forum non conveniens so as to evade responsibility under the policies;

(c) substantial contacts with New York and the compelling interests of New York in providing its residents with a means of legal recourse against foreign insurers, as evidenced by its special insurance legislation, require the application of New York law in this forum; and

(d) a majority of the witnesses and the documentary evidence necessary to the trial of this action are located in New York and are subject to compulsory process here but not in the foreign forum?

2. Should this Court resolve the conflict among the circuits and the confusion within the Second Circuit created by the opinion of the Court of Appeals in this case?

Statement of the Case

Petitioner Calavo Growers of California ("Calavo") is an agricultural marketing cooperative authorized to do business in New York. In 1977, Calavo purchased $1.2 million worth of Turkish figs through its New York purchasing agent, the Effron Brokerage Company ("Effron"). Calavo also purchased, through Effron, a special type of high risk insurance to cover the risk "of rejection or condemnation" of the figs by government health authorities of the importing country, namely, the United States Food and Drug Administration.*

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*This type of insurance, known as "rejection insurance," has been developed primarily to serve the needs of American businesses seeking to import goods and produce into the United States. Because of the rigorous federal health regulations which apply to such imports and the vigilant enforcement thereof by the Food and Drug Administration, rejection or condemnation

This "rejection insurance" was provided by respondents, a syndicate of eighteen European underwriters, who regularly engage in the business of providing such insurance to United States and foreign businesses.* (A-4, 5).

Before being shipped from Turkey, the figs were inspected by Turkish agricultural officials and by a Lloyd's agent and then were loaded aboard sailing vessels bound for New York. Details of each shipment were telexed to Effron in New York. Respondents then mailed to petitioner, through Effron in New York, insurance certificates covering each shipment. (A-5, 6).

Between December 1977 and March 1978, 13 shipments of figs arrived in the port of New York. The FDA then inspected the figs and rejected portions of eight of the shipments valued at $757,768. With respect to each rejected shipment, Effron complied with the procedures provided for in the insurance certificates by promptly submitting claims to respondents' agent in New York, Toplis & Harding

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of those goods is a common occurrence. As a result, the insurance must be purchased at the unusually high premium of 13.5% of the value of the insured goods. (A-5)

*This insurance was obtained through two insurance brokers, Bain Dawes (International) Limited, a British broker for Lloyd's of London, and a Belgian broker, Ch. Van den Bosch - J.F. de Laet. The insurance cover note was issued by respondents and mailed to Effron in New York. (A-5)

("T&H"). T&H directed that the rejected figs be warehoused in New York and New Jersey. After surveying the merchandise and sending its survey reports to the respondents' agent in Europe, T&H sold the rejected figs for respondents in New York, thereby reducing the amount of any claims against respondents under the policy. (A-6).

Effron thereafter submitted claims under the rejection insurance policy to respondents through T&H in New York, but respondents refused to honor any of petitioner's claims. Despite the fact that the figs had been inspected by Turkish officials and a Lloyd's agent prior to shipment to New York, respondents claimed Calavo had failed to prove that the condition causing rejection by the FDA had occurred during, rather than before, shipment of the insured goods. No such requirement is to be found in the insurance contracts and, in fact, such an interpretation is materially at variance with the plain language of the contracts. (A-7).

Respondents deceived petitioner into delaying the commencement of this action and then commenced a declaratory judgment action in the Commercial Court of Antwerp, seeking an opinion that they were not liable under the policy. That action is still pending. Two weeks later, on March 8, 1979, petitioner instituted this action in United States District Court for the Southern District of New York, seeking monetary relief for breach of contract and fraud. Respondents moved to dismiss the complaint, claiming the District Court lacked personal jurisdiction and forum non conveniens.

The District Court held that it had jurisdiction over respondents but dismissed Calavo's complaint on forum non conveniens

grounds, since the Commercial Court of Antwerp was deemed to be an "alternative forum available to the parties." (A-7, 8 and 18, 19, n.3).

On August 4, 1980, the Court of Appeals conditionally affirmed the District Court's forum non conveniens dismissal, assuming "the willingness of the Belgian courts to hear this case, and upon the consent of all of the defendants to submit to jurisdiction in Belgium." (A-14). In a separate concurrence, Judge Newman added:

> "a word of caution to emphasize the controlling principles that just barely permit the result reached in this case . . . . The plaintiff's choice of forum should normally be respected. The circumstances of this case approach the limits in which a district judge may exercise discretion to transfer to another forum." (A-21, 22).

Reasons for Granting the Writ

The Court of Appeals conditionally affirmed the District Court's dismissal of petitioner's complaint solely on the grounds of forum non conveniens. As articulated in Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947), that doctrine prohibits a District Court from dismissing an action over which it has jurisdiction unless it is determined, after weighing certain interests of the litigants and of the public, that "the balance is strongly in favor of defendant," and that there exists an adequate alternative forum in which the plaintiff can pursue its claims. 330 U.S. at 507-08. Koster v. Lumbermens Mutual Casualty Co., 330 U.S. 518, 524 (1947); Fitzgerald v. Texaco, Inc., 521 F.2d 448, 452-3 (2d Cir. 1975), cert.

denied, 423 U.S. 1052 (1976); Leasco Data Processing Equipment Corp. v. Maxwell, 468 F.2d 1326, 1344 (2d Cir. 1972).

In the instant case, the Court of Appeals has misapplied the principles of Gulf Oil, materially altering the proof required of a defendant seeking dismissal of an action on grounds of forum non conveniens, and has failed to conduct any inquiry into the adequacy of the foreign forum to which it would relegate plaintiff to pursue its claims. In so doing, the Court has created a substantial conflict among the circuits and engendered substantial confusion within the Second Circuit as to the proper application of the forum non conveniens doctrine.

1. The Court of Appeals Misapplied the Forum Non Conveniens Doctrine in This Case

A. The Belgian Proceedings Do Not Constitute An Adequate Alternative Forum

Until its decision in this case, the Second Circuit had consistently recognized that a forum non conveniens dismissal was prohibited unless the District Court determined that the plaintiff had an adequate alternative forum in which to pursue its claims. Alcoa Steamship Co. v. M/V Nordic Regent, No. 78-7054 at 5971, n. 16 (2d Cir. Feb. 25, 1980). In particular, courts have been required to insure that all parties will be subject to the jurisdiction of the foreign court and that the foreign court is able and willing to thoroughly address the plaintiff's claims. Farmanfarmaian v. Gulf Oil Corp., 558 F.2d 880, 881 (2d Cir. 1978); Schertenleib v. Traum, 589 F.2d 1150, 1160 (2d Cir. 1978); Fitzgerald v. Texaco, Inc., 521 F.2d 448, 452 (2d Cir. 1975).

In this case, these concerns have been left for the parties themselves to address in the proceedings in Belgium. The District Court conducted no inquiry whatsoever into the complete inability of the Belgian court to afford plaintiff any monetary relief or into the serious problems concerning the jurisdiction of the Belgian court and the lack of adequate discovery under Belgian law. In fact, the hastily-commenced proceedings initiated by respondents in Belgium involve only claims for declaratory relief, and cannot award the monetary relief requested by Calavo in this action. Even if the Belgian court determined that respondents are liable under the policy, Calavo will be required to commence a new action in Belgium or in New York in order to recover damages.

Because Belgium is not a signatory to the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, October 7, 1972, 23 U.S.T. 2555, T.I.A.S. 7444, the ability of the parties to conduct discovery in connection with the Belgian proceedings will be severely curtailed. In addition, the proceedings themselves will be extremely protracted and costly, as evidenced by affidavits of Belgian counsel. Finally, there are serious questions as to whether the Belgian court has subject matter jurisdiction even with respect to respondents' claims.*

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*Under these circumstances, requiring respondents to consent to personal jurisdiction in Belgium, as the Court of Appeals has done, provides no assurance the case can be heard in Belgium. In addition, it is highly inequitable to force petitioner to litigate in a foreign forum in which it might not otherwise be subject to jurisdiction.

The District Court simply "assumed that because defendants have invoked the jurisdiction of the court in Antwerp, they will be subject to its jurisdiction in an action against them by Calavo", and therefore assumed that an adequate forum was available to Calavo. (A-48, n.13)

The many defects in the Belgian proceedings, described herein, render them a totally inadequate forum in which to resolve Calavo's claims. The failure of the District Court to conduct any inquiry into those matters has thus deprived Calavo of any meaningful legal remedy in this case.

B. This Action's Substantial Contacts With New York and The Compelling Interests of This Forum in Protecting Its Residents Against Predatory Practices By Foreign Insurers Require The Application of New York Law

In Gulf Oil, this Court included among the considerations of public interest to be weighed upon a forum non conveniens motion, both the applicability of the law of the forum which the plaintiff has chosen and the "local interest in having localized controversies decided at home." 330 U.S. at 508-09.

New York courts will apply the law of the forum which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issues raised in the litigation. Farmanfarmaian v. Gulf Oil Corp., 437 F.Supp. 910, 924, n. 16 (S.D.N.Y. 1977), aff'd, 588 F.2d 880 (2d Cir. 1978); Babcock v. Johnson, 12 N.Y.2d 473, 481, 240 N.Y.S.2d 743, 749, 191 N.E.2d 279, 283 (1963). There can be no

question but that the law of New York must be applied in this case.

As evidenced by the special insurance legislation it has enacted, New York Insurance Law § 59-2 (McKinney 1966), New York has a compelling and "manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims," McGee v. International Life Ins. Co., 355 U.S. 220, 223 (1957), and in protecting them against predatory practices by foreign insurers.

Respondents, a group of 18 foreign underwriters, regularly provide rejection and other types of insurance to many United States corporations, including Calavo. Recently, respondents have systematically begun to engage in a practice of simply rejecting all claims filed by domestic corporations under those policies, in flat contravention and disregard of the provisions of those policies. Thereafter, the insured parties have brought suit against respondents, only to be met with motions to dismiss claiming that it is inconvenient for respondents to defend in United States courts, or that those courts lack jurisdiction over respondents despite their business activities in this country.* In this

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*Petitioner is aware of at least three recent actions similar to this case brought by American plaintiffs against many of the respondents in this case, Aptco Distributors, Inc. v. Generali Belgium, No. 80-2079 (N.D. Cal., filed July 9, 1980); Homa Company v. Cornwall & Stevens Co., Inc., No. 79-4500 (S.D.N.Y., filed August 24, 1979); SSC International, Inc. v. Cornhill Insurance Company Limited, No. 77-5490 (S.D.N.Y.,

case the District Court rejected respondents' claims of lack of jurisdiction but agreed that it would be more convenient for them to defend against Calavo's claims in Belgium.

Respondents are thereby circumventing and evading the efforts by various state legislatures in the United States to protect their insured residents and to provide them with an effective means of redress against foreign insurers who deny such claims. In the past, this Court has been particularly sensitive to such efforts. It should not now lend its tacit approval to respondents' efforts to distort the forum non conveniens doctrine in this manner, and to evade the safeguards developed by the state legislatures in conformity with the constitutional guidelines previously set down by this Court.

Other factors requiring the application of New York law and resolution of Calavo's claims in this forum include the substantial contacts this action has with New York. The insurance policy at issue was ordered, and delivered to New York and premiums were collected by respondents from New York. Respondents at all times

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Dec. 5, 1978), seeking to collect on rejection insurance policies. The SSC court found that defendants had wrongfully failed to honor plaintiff's claims for payment under the rejection insurance policy. Defendant insurers in the Homa case have moved, as have respondents in this case, to dismiss plaintiff's complaint on forum non conveniens and jurisdictional grounds. Aptco Distributors was only recently filed.

knew that they were insuring a New York-licensed corporation against a risk which would, and did in fact, arise in New York. The insured goods were shipped to the port of New York where they were inspected and rejected by the FDA, giving rise to the claims at issue. Thereafter, respondents' New York agent inspected the goods, reported to respondents and then brokered the goods in New York, thereby reducing the loss to respondents under the policy. Finally, the claims at issue were submitted to respondents' New York agent and Calavo was notified in New York of respondents' rejection of its claims. Under these circumstances, New York has a compelling interest in having this case decided in this forum pursuant to its laws.

C. The Witnesses and Documents Necessary to the Trial of This Action Are Located, and Subject to Compulsory Process, in New York and Not in Belgium

Calavo's complaint, alleging breach of contract and fraud, involves two principal questions: (1) the validity of the construction placed upon the insurance contract by respondents, and (2)the inspection by T&H and the FDA and condition of the produce upon its arrival in the port of New York. Resolution of these issues will require the testimony of witnesses and documents which, with the exception of respondents themselves, are located in New York. These include T&H, respondents' New York agent, and its inspection reports, the FDA officials and records, involving the inspection of the goods, Effron and Calavo. The witnesses located outside New York, respondents or the brokers who acted on their behalf and the people who inspected the goods in Turkey, are no more accessible to the parties in Belgium than in New York. The limitations on discovery and

compulsory process in Belgium have previously been noted.

Upon consideration of the foregoing, it is apparent that in this case, the balance of interests under Gulf Oil cannot possibly be said to lie "strongly" in favor of respondents, and hence that forum non conveniens dismissal is totally inappropriate. Leasco Data Processing Equipment Corp. v. Maxwell, supra, 468 F.2d at 1344; Top Form Mills v. Sociedad Nationale Industrias Applicazion Viscona, 428 F.Supp. 1237, 1253 (S.D.N.Y. 1977).

2. The Court of Appeals' Opinion Has Created a Substantial Conflict Among the Circuits and Confusion Within the Second Circuit as to the Proper Application of the Forum Non Conveniens Doctrine

The Court of Appeals held in this case that a foreign defendant need only prove that a resident plaintiff's choice of forum is "inconvenient", (A-10), in order to dismiss that resident's complaint on forum non conveniens grounds and to force him to pursue his claims in the courts of a foreign country. This standard materially differs from the standards employed in at least three other circuits, and is in conflict with this Court's opinion in Koster v. (American) Lumberman's Mutual Casualty Co., 330 U.S. 518, 524 (1947).

In Koster, a case decided the same day as Gulf Oil, this Court held that a plaintiff should not be deprived of his choice of forum except "upon a clear showing of facts which . . . establish such oppressiveness and vexation to a defendant as to be out of all proportion to plaintiff's convenience." 330 U.S. at 524. This rule was adopted briefly

in the Second Circuit in Alcoa Steamship Company, Inc., v. M/V Nordic Regent, No. 78-7054 (2d Cir. Jan. 10, 1979), but then rejected in its subsequent en banc decision in Alcoa and in this case. Apart from the conflict between the standard set down by this Court in Koster and the Second Circuit's opinion in this case, it remains the law in at least three other circuits, i.e., the Third, Fifth and District of Columbia Circuits, that there must be positive evidence of unusually extreme circumstances making it "materially unjust" to the defendant that jurisdiction be retained in the American courts before a resident citizen will be dispatched to the courts of a foreign country. See Hoffman v. Goberman, 420 F.2d 423 (3d Cir. 1970); Mobil Tankers Company v. Mene Grande Oil Co., 363 F.2d 611 (3d Cir.), cert. denied, 385 U.S. 945 (1966); In Re Unterwesser Reederi GmbH, 428 F.2d 888, 895 (5th Cir. 1970), vacated on other grounds sub nom., Zapata Off-Shore Company v. M/S Bremen, 407 U.S. 1 (1972); Founding Church of Scientology v. Verlag, 536 F.2d 429, 436 (D.C. Cir. 1976) (requiring proof that plaintiff's choice of forum is "prompted by an intent to vex or harrass").

The Court of Appeals' holding in this case also directly conflicts with its prior decision in Leasco Data Processing Equipment Corp. v. Maxwell, 468 F.2d 1326 (2d Cir. 1972), where Judge Friendly, writing for the Court, held

> "'that courts should require positive evidence of unusually extreme circumstances, and should be thoroughly convinced that material injustice is manifest before exercising any . . . discretion to deny a

> citizen access to the court of this country.' . . . Defendants' claims of inconvenience from trial in New York do not measure up to the standards thus required." Id., 1344 (citing Burt v. Isthmus Development Company, 218 F.2d 353, 357 (5th Cir.), cert. denied, 349 U.S. 922 (1955)).

The Second Circuit's rejection of the Koster standard and, sub silentio, its own decision in Leasco Data, have created serious confusion within the Second Circuit as to the proper application of the forum non conveniens doctrine. More importantly, there clearly now exists a substantial conflict in the standards employed by at least four of the circuits on a federal procedure question of increasing importance. These problems, not addressed by the Court for over thirty years, can be resolved only by this Court.

Conclusion

For all the foregoing reasons, it is respectfully urged that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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November 3, 1980

Appendix A

UNITED STATES COURT OF APPEALS

For the Second Circuit

Nos. 1100, 1241 September Term 1979

Argued May 29, 1980 Decided August 4, 1980

Docket Nos. 80-7016, 80-7046

Calavo Growers of California,

Plaintiff-Appellant-Cross Appellee,

-against-

Generali Belgium; Compagnie D'Assurances Maritimes Aeriennes et Terrestres; Deutsche Versicherungs-Gesellschaft in Bremen; Black Sea and Baltic General Insurance Company Limited; Assurantie Van de Belgische Boeren-bond; General Accident Fire and Life Assurance Corporation Limited; Groep Josi; Mercator; De Ster (L'Etoile); Fidelitas; L'Europeene; La Securite Belge; Naviga; Compagnie Euro-peene D'Assurances Industrielles (C.E.A.I.); Belgamar; Assubel; Assurances Generales; and La Royale Belge.

Defendants-Appellees-Cross Appellants.

Before: FEINBERG, Chief Judge,

NEWMAN, and KEARSE, Circuit Judges.

Appeal and cross-appeal from judgment of the United States District Court for the Southern District of New York, Robert W. Sweet, J., finding jurisdiction over all defendants but dismissing plaintiff's action for breach of contract and fraud on grounds of forum non conveniens.

Remanded.

JERRY L. SIEGEL, New York, NY (Coudert Brothers, Mark D. Lebow, Lynne M. Barry, New York, NY, Tuttle & Taylor, Charles B. Rosenberg, Los Angeles, CA, of Counsel), for Plaintiff-Appellant-Cross Appellee.

DONALD M. KENNEDY, New York, NY (Donovan, Maloof, Walsh & Kennedy, David L. Maloof, Gerard S. Doyle, Jr., New York, NY), for Defendants-Appellees-Cross Appellants.

FEINBERG, Chief Judge:

Calavo Growers of California appeals from a judgment of the United States District Court for the Southern District of New York, Robert W. Sweet, J., that found jurisdiction over defendants, eighteen foreign insurance underwriters, but dismissed on the ground of forum non conveniens Calavo's action for breach of contract and fraud. Sixteen of the underwriters cross-appeal from so much of the judgment as denied their motion to dismiss on the ground of lack of jurisdiction. Calavo argues that the lower court properly found jurisdiction over these underwriters but erred in holding that New York was an inconvenient forum; in contrast, the cross-appellants contend that the court erred as to jurisdiction, but correctly decided the issue of forum non conveniens. Since we conclude that the district judge did not abuse his discretion in dismissing this action on the basis of forum non conveniens, we find it unnecessary at

this time to determine whether he erred in finding jurisdiction over the cross-appellant underwriters. We believe, however, that a forum non conveniens dismissal of plaintiff's action should have been conditioned on the agreement of all the underwriters to terms set forth below; accordingly, we remand this case for further proceedings consistent with this opinion.

I.

The relevant facts are as follows: Calavo, a California corporation authorized to do business in New York, is an agricultural marketing cooperative. In 1977, Calavo purchased several shipments of Turkish figs through its purchasing agent Effron Brokerage Corp., a New York corporation. Effron also arranged insurance for the fig shipments by contacting Bain Dawes (Int'l) Ltd. (Bain Dawes), a broker for Lloyd's of London located in London. Effron instructed Bain

Dawes to acquire both standard marine insurance and "rejection" insurance for the figs; the latter type of insurance protects against the risk of rejection or condemnation of the insured goods by the government of the country of import for failure to meet local health standards.

In order to arrange the insurance, Bain Dawes apparently contacted Ch. Van den Bosch-J.F. de Laet (Van den Bosch), a Belgian insurance broker. Van den Bosch in turn contacted defendant underwriters all of whom were organized, and have their principal place of business, in Europe.[1/] Only two of the underwriters are authorized to do business in New York. By a cover note issued on a Van den Bosch form, the underwriters bound themselves to a policy of marine and rejection insurance naming Effron as the insured. This cover note evidently was forwarded to Bain Dawes in London, which then issued another cover note directly to Effron. As the various shipments

were made, Effron would notify Bain Dawes; individual insurance certificates naming Calavo as the insured would then be issued on Van den Bosch forms that were signed by an agent for all the underwriters. The certificates, as well as the bills for premiums due upon them, were mailed to Effron in New York.

Eight of the thirteen shipments of figs sent from Turkey to New York were rejected in whole or in part by the United States Food and Drug Administration (FDA) on the ground that they were infested by insects. Upon receiving notice of the rejections and in compliance with the instructions given in the insurance certificates, Effron contacted Toplis & Harding, (T & H) a maritime surveyor located in New York. After instructing Effron to warehouse the shipments, T & H surveyed them and prepared reports that apparently were sent to the underwriters; it then solicited bids for the resale of the figs, and recommended to Effron that the highest bid be

accepted, which recommendation Effron followed.

Effron submitted formal insurance claims to the underwriters through T & H. The underwriters refused to pay these claims, however, allegedly on the ground that the insurance policies required Calavo to prove affirmatively that the contamination of the figs had occurred during, rather than before, the shipments. Thereafter, the underwriters commenced an action in the Commercial Court of Antwerp for a declaratory judgment that they were not liable on the policies. Approximately two weeks later, Calavo instituted the present action, alleging that the underwriters had breached the contract of insurance and had fraudulently failed to disclose their interpretation of the insurance policy.

II.

In the district court, defendants moved to dismiss the complaint both on the ground that the court lacked in personam

jurisdiction over them and on the ground that New York was an inconvenient forum. The court below held that it had jurisdiction over all defendants; as noted, two of the underwriters were authorized to do business in New York and apparently do not now contest the court's jurisdiction over them. As to the remaining sixteen insurers, the court concluded that it had jurisdiction under N. Y. Ins. Law § 59-a.[2/] As to all eighteen defendants, the court then granted the motion to dismiss on the ground of forum non conveniens. On this appeal, Calavo attacks the district court's ruling on forum non conveniens, while defendants urge that we affirm that ruling, but reverse the lower court's finding of jurisdiction over the sixteen insurers not authorized to do business in New York.

If the district court had no jurisdiction over the sixteen unauthorized underwriters, New York clearly was an inconvenient forum, since only two of the eighteen defen-

dants could have been sued here. On the other hand, if the court did have jurisdiction over all defendants, the question of whether New York was an inconvenient forum is a much closer one. However, while not all of us might have decided this issue as did the court below, we recognize that a district judge has "wide discretion" in determining the issue of forum non conveniens. See Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947); Alcoa Steamship Co. v. M/V Nordic Regent, No. 78-7054, slip op. at 5945, 5969-70 (2d Cir. Feb. 25, 1980) (en banc); Farmanfarmaian v. Gulf Oil Corp., 588 F.2d 880, 882 (2d Cir. 1978). Even on the assumption that the district court had jurisdiction over all eighteen defendants, we believe that the district court's dismissal of this action on the ground of forum non conveniens was not a clear abuse of discretion. See Farmanfarmaian, supra, 588 F.2d at 882. Therefore, we need not reach the question whether the court erred in finding that it had

jurisdiction over the sixteen defendants unauthorized to do business in New York.

In determining whether New York was a convenient forum, the district court properly took into account the factors set forth in Gulf Oil, supra, 330 U.S. at 508-09. The court considered first the "private interest" of the litigants, including the "relative ease of assess to sources of proof," the "availability of compulsory process for attendance of unwilling, and the cost of obtaining attention of willing, witnesses," and "all other practical problems that make trial of a case easy, expeditious and inexpensive." Id. at 508. These factors, in the court's view, all pointed to the conclusion that New York was an inconvenient forum. The focal point of this litigation is not New York, where the rejection of the figs took place, but rather Europe, where the contract of insurance was negotiated and where payment under the contract was refused. As the district

court noted, Calavo did not contest in the courts below either the findings of infestation made by the FDA or the assessment of damages made by T & H; instead, the gravamen of the complaint was breach of contract and fraud.[3/] These allegations will necessitate an inquiry into the circumstances surrounding the formation of the contract and the intentions of the parties who negotiated it, almost all of whom are located in Europe. The underwriters all are organized and have their principal places of business in Europe; sixteen of them do no business in New York. Moreover, neither Bain Dawes, the London broker who apparently acted as Calavo's agent, nor Van den Bosch, the Belgian broker who negotiated the insurance contract, is subject to the court's compulsory process, although representatives of both may be key witnesses. Finally, the documents surrounding the negotiations are apparently located in Belgium. In contrast, the lower court found that with

the possible exception of Effron and a representative of T & H, there were no essential witnesses located in New York. Furthermore, to the extent that evidence will be required as to the condition of the figs in Turkey prior to shipment, a European forum is certainly no less convenient than one in New York.

The court also looked to the "[f]actors of public interest" that Gulf Oil held to be relevant to the application of the doctrine of forum non conveniens. 330 U.S. at 508-09. The lower court found that Belgium was apparently the jurisdiction most intimately concerned with the issues raised in this litigation.[4/] The suit involves its residents; more importantly, it involves a contract negotiated and allegedly breached in Belgium, and may require an inquiry into the customs of the insurance industry in Belgium and Europe at large.[5/] This connection with the law suit militates, the lower court found, in

favor of the application of Belgian law, see Babcock v. Jackson, 12 N.Y.2d 473, 481-82 (1963); the likelihood that Belgian law would govern in turn lends weight to the conclusion that the suit should be prosecuted in that jurisdiction. See Schertenleib v. Traum, 589 F.2d 1156, 1165 (2d Cir. 1978); cf. Gulf Oil, supra, 330 U.S. at 509. Finally, the lower court noted that judicial efficiency will be served by trying this case in Belgium, where the underwriters' action is already in progress; by dismissing this suit, the court pointed out, needless duplication of proof and waste of judicial resources will be avoided. Cf. Gulf Oil, supra, 330 U.S. at 508.

We do not mean to suggest that the issue whether New York was an inconvenient forum could only have been decided one way. Nonetheless, the district court applied the proper tests, and carefully considered both the public and private interests at stake. Under the circumstances, we cannot say that

the district court abused its discretion by dismissing the action. We do believe, however, that a dismissal on this ground should have been conditional only. The doctrine of forum non conveniens presupposes that an alternative forum is available. See Gulf Oil, supra, 330 U.S. at 506-07. The court below noted that the existence of an alternative forum was uncontested in this case, and assumed that because defendants had invoked the jurisdiction of the court in Antwerp, they will be subject to its jurisdiction in an action brought by Calavo against them there. While the court's assumption in this regard may be correct, we believe that it would have been wiser to make the dismissal conditional upon the willingness of the Belgian courts to hear this case, and upon the consent of all of the defendants to submit to jurisdiction in Belgium.[6/] As we pointed out in Schertenleib, supra, 589 F.2d at 1163, the conditional dismissal device obviates the need for extensive

inquiry into foreign jurisdiction law, since if the foreign court refuses to take jurisdiction, "plaintiff is still protected by the conditional nature of the dismissal." Furthermore, we think that the dismissal also should have been conditioned upon an agreement by defendant underwriters both to waive any statute of limitations defense that has arisen since the commencement of the action in the Southern District and to pay any judgment that might be rendered against them. See Alcoa Steamship, supra, slip op. at 5971 n.16; Schertenleib, supra, 589 F.2d at 1166; Fitzgerald v. Texaco, Inc., 521 F.2d 448, 449 (2d Cir. 1975), cert. denied, 423 U.S. 1052 (1976).

Since defendants have consistently maintained that the Belgian court is an adequate alternative forum, it seems unlikely that they would have objected to any of the foregoing conditions, which do no more than ensure the adequacy of the alternative forum.

We have therefore concluded that the simplest and most straightforward disposition of plaintiff's appeal is to remand for a determination of whether the defendants will now consent to a conditional dismissal. If all of the defendants so consent, the district court may enter an appropriate order conditionally dismissing the action.

This disposition renders unnecessary for the present an adjudication of defendants' cross-appeal challenging the district court's finding of personal jurisdiction. We shall retain jurisdiction over the cross-appeal. We anticipate that it will be mooted by entry of an order of conditional dismissal, and, should such an order be entered, we expect that we will be promptly advised. However, if for some unforeseen reason all of the defendants do not consent to a conditional forum non conveniens dismissal, then upon notification of the parties we will once again take up the cross-appeal. For this purpose, we shall not

consider a defendant's consent to entry of a conditional dismissal as having any effect on the personal jurisdiction issue.

Remanded with no award of costs.

FOOTNOTES

1/ From the record before us, it appears that fourteen of the underwriters were incorporated, and have their principal place of business, in Belgium; two were incorporated, and have their principal place of business, in the United Kingdom; one was incorporated, and has its principal place of business, in France; and one was incorporated, and has its principal place of business, in West Germany.

2/ N.Y. Ins. Law § 59-2 subjects insurers not authorized to do business in New York to the jurisdiction of New York courts in suits by insured parties under certain insurance contracts. Under § 59-a(2), unauthorized insurers are deemed to have appointed the Superintendent of Insurance as their agent for service of process if they effect "by mail or otherwise" certain "acts" in New York, including the issuance or delivery of insurance contracts to New York residents, the collection of premiums for such contracts, or any other transaction of business. While rejecting the other bases of jurisdiction under § 59-a that Calavo contended were applicable here, the district court held that Calavo had made out a prima facie case of delivery of the insurance policies through the agency of Van den Bosch; the court therefore concluded that it had jurisdiction over the underwriters not authorized to do business in New York.

3/ Calavo alleged in its complaint that "[t]his action for damages arises from defendants' fraud in connection with the issuance of, and breach of, an insurance

contract and the policies thereunder." More specifically, Calavo alleged that the underwriters had fraudulently failed to disclose that they had conspired to adopt a construction of the rejection clause that was "materially at variance with the plain meaning of the clause" in that it required Calavo to show that the condition causing rejection arose during shipment of the goods rather than before shipment.

At oral argument before us, it appeared for the first time that the terms of the contract were not in fact in dispute. The parties disagree on the responsibility for this new-found harmony, each side claiming that the other has changed its position regarding the meaning of the rejection clause. But regardless of who has changed position, the absence now of any contract interpretation issues does not affect our disposition of this case, because essential evidence as to the condition of the figs prior to shipment would still lie outside New York.

4/ Calavo argues that the district court failed to give any consideration to New York's substantial interest in protecting its residents from fraudulent practices by foreign insurers, as evidenced by N.Y. Ins. Law § 59-a. That statute defines the jurisdiction of New York courts over insurance corporations not authorized to do business in New York. But the doctrine of forum non conveniens presupposes that the court has jurisdiction over the parties. Thus, section 59-a does not preclude a court from determining, as did the district court here, that it has jurisdiction but that New York is an inconvenient forum.

5/ The district court also pointed out that there is an "element of reliance" that argues in favor of the application of Belgian law, since the defendants never left Europe or sought this business in New York, and apparently did not know initially that the shipments of figs were destined for New York.

6/ Calavo argues that it submitted an affidavit by a Belgian attorney that suggests that Belgium may not be an adequate alternative forum, both because the Commercial Court of Antwerp may not have subject matter jurisdiction over the underwriters' action and because in any event proceedings in that court are likely to be inordinately protracted. That affidavit does not directly state, however, that Belgian courts would not entertain an action by Calavo against the defendants; in contrast, defendants filed an affidavit by another Belgian attorney that stated that Belgian courts "are fully prepared to render an impartial decision based upon the merits of the case and to direct and enforce the appropriate remedy for the prevailing parties." On this record, we cannot say that the district court was not justified in believing that Belgium was an adequate alternative forum. See Schertenleib v. Traum, 589 F.2d 1156, 1163 (2d Cir. 1978). But as we suggested in Schertenleib, supra, 589 F.2d at 1163, even when the district court "justifiably believes" that there is an adequate alternative forum, it is advisable to make any dismissal conditional in nature when there is uncertainty or conflict between expert opinions with regard to foreign jurisdictional law.

NEWMAN, Circuit Judge, concurring:

I concur, but add a word of caution to emphasize the controlling principles that just barely permit the result reached in this case. First, the plaintiff's choice of forum is to be respected unless the balance of both public and private interests strongly justifies a transfer. The Supreme Court has emphasized that "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947).

Second, the assessment of whether the balance of public and private interests strongly overcomes the plaintiff's choice of forum must be made in light of the realities of modern transportation and communications. A forum is not necessary inconvenient because of its distance from pertinent parties or places if it is readily accessible in a few

hours of air travel. It will often be quicker and less expensive to transfer a witness or a document than to transfer a lawsuit. Jet travel and satellite communications have significantly altered the meaning of "non conveniens."

There is an understandable temptation in a busy district like the Southern District of New York to transfer cases that can as appropriately or even slightly more appropriately be tried elsewhere. That temptation must be resisted. The plaintiff's choice of forum should normally be respected. The circumstances of this case approach the limits in which a district judge may exercise discretion to transfer to another forum.

Appendix B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - -

CALAVO GROWERS OF CALIFORNIA,

Plaintiff,

vs.

79 Civ. 1219 (RWS)

GENERALI BELGIUM, et al.,

Defendants.

OPINION

- - - - - - - - - - - - - - - - - -

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SWEET, D.J.

Eighteen European insurers have moved to dismiss this diversity action pursuant to Fed.R.Civ.P. 12 on the grounds that the court lacks in personam jurisdiction or because this forum is an inconvenient one. For the latter reason, defendants' motion is granted.

Calavo Growers of California ("Calavo"), a California corporation authorized to do business in New York, seeks to recover under certificates of insurance for the rejection of figs sent from Turkey to New York.[1/] Portions of the fig shipments were rejected in New York by the Food and Drug Administration (FDA) for failure to meet local health standards. The defendant underwriters declined payment of the loss and commenced an action in the Commercial Court of Antwerp for a declaratory judgment as to their liability. Two weeks later, plaintiff instituted suit in

this court for breach of contract and fraud by serving Toplis and Harding, an alleged agent of defendants, and the Superintendent of Insurance of the State of New York.

The rejected figs were purchased by Calavo through its purchasing agent, the Effron Brokerage Corporation ("Effron"), a New York corporation. Effron contacted Bain Dawes (International) Limited ("Bain Dawes") by telephone call from New York to London, and instructed it to acquire insurance for the shipments of figs. Bain Dawes, a broker of Lloyd's of London, apparently contacted Ch. Van den Bosch - J.F. DeLaet ("Van den Bosch"), a Belgian insurance broker, who in turn secured the requested insurance from the syndicate of defendant underwriters.

Van den Bosch initially bound the risk with the defendants by a cover note dated August 22, 1977, that named Effron as the insured and provided that in the event of rejection of the figs, a Lloyd's agent should

be contacted. This cover note was sent to Bain Dawes in London, and on September 6, 1977, Bain Dawes issued a similar cover note that was addressed to Effron in New York. As Effron received information regarding the specifics of each shipment, it forwarded this information to Bain Dawes, and individual certificates of insurance were issued on Van den Bosch's preprinted forms reflecting that Calavo was insured by the eighteen defendant underwriters. These certificates were signed by Ketels & Co., as agent of the underwriters, and provided that in the event of rejection of the figs, Toplis & Harding ("T & H") was to be notified.

I. Jurisdiction

Calavo has sought to effect service upon sixteen of the defendants[2/] by serving the New York Superintendent of Insurance pursuant to New York Insurance Law §59-a. Plaintiff also attempted to effect service by serving T & H, an allegedly authorized agent of the

defendants for the service of process in this jurisdiction. Defendants contend that they have not engaged in any activity in New York which can serve as the basis of valid service upon them and deny that T & H is an agent authorized to accept service of process on their behalf.[3/]

The purpose of New York Insurance Law §59-a is to subject certain insurers not authorized to do business in New York to the jurisdiction of the courts in suits by insureds under certain insurance contracts.[4/] The section provides for substituted service on the Superintendent of Insurance in actions in which the insurer issued or delivered contracts of insurance in this state, collected premiums in New York or transacted other business here.[5/]

Section 59-a appears to extend the territorial effects of the court's process to the very perimeters of the due process clause. See Ford v. Unity Hospital, 32 N.Y.2d 464, 470-71, 346 N.Y.S.2d 238, 242-43, 299 N.E.2d

659, 662 (1973).[6/] Consequently, in order to establish jurisdiction, plaintiff need simply show that defendants had certain "minimum contacts with [the state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). To do this, they must demonstrate that defendants have "purposefully availed [themselves] of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." Hanson v. Denckla, 357 U.S. 235, 253 (1958).

In the insurance context, when an insurer sends an insurance contract and premium notice into the state to an insured resident, it has sufficient contact with the state for that state's courts to exercise jurisdiction over the insurer. See Kulko v. California Superior Court, 436 U.S. 84, 97 (1978); McGee v. International Life Insurance Co., 355

U.S. 220 (1957). The plaintiff alleges that such minimum contacts are present in this action, but it bears the burden of establishing jurisdiction where challenged. McNutt v. General Motors & Corp., 298 U.S. 178, 189 (1936); Marketing Showcase, Inc. v. Alberto-Culver Co., 445 F. Supp. 755, 759 (S.D.N.Y. 1978). At this juncture, the burden is only to make a "threshold" showing of jurisdiction sufficient to demonstrate the fairness of allowing the suit to continue. See United States v. Montreal Trust Company, 358 F.2d 239, 242 n.4 (2d Cir.), cert. denied, 384 U.S. 919 (1966). This showing, however, does not relieve plaintiff from proving the facts at trial needed to establish jurisdiction by a preponderance of the evidence. Id. See also Marketing Showcase, Inc. v. Alberto Culver Co., supra, at 757-60; El Cid, Ltd., v. New Jersey Zinc Co., 444 F. Supp. 845, 850 (S.D.N.Y. 1977).

A. Issuance of Insurance

Plaintiff asserts that this court

has jurisdiction over defendants under section 59-a, no matter where the insurance was issued, simply because it was knowingly issued by the defendants to a New York corporation.

Section 59-a, subd. 1 specifically states that the legislature was concerned about New York residents holding policies of insurance issued or delivered in this state by insurers not authorized to do business here (emphasis added). Similarly, section 59-a, subd. 2 provides that any of the following acts in this state constitute appointment of the Superintendent of Insurance to receive service on their behalf (emphasis added). No cases have been found interpreting this provision to mean that the issuance of insurance contracts outside of New York to a New York resident is sufficient to establish in personam jurisdiction over an insurer.

Moreover, plaintiff's position is open to serious challenge on due process grounds.

If a foreign insurer's only contact with the forum state is to issue a policy to a resident of that state outside its boundaries without ever soliciting business, delivering the policy, collecting premiums or transacting any other business within its boundaries, the "quality and nature" of the defendants' activities are not such that it would be fair to require them to conduct their defense in New York. See International Shoe Co. v. Washington, 326 U.S. at 316-17, 319 (1945). Accord, Kulko v. California Superior Court, 436 U.S. at 92 (1978).

B. Collection of Premiums and Delivery of Insurance

Calavo asserts that the mailing of the premium payments from New York constitutes "collection of premiums" and therefore confers jurisdiction under section 59-a, subd. 2(a)(3). Plaintiff also contends that the mailing of the cover notes and insurance certificates

into the state by defendants or Van den Bosch subjects defendants to this court's jurisdiction under section 59-a, subd. 2(a)(1). It further asserts that even if the cover notes and certificates were not actually mailed to Effron by defendants or its agent, because they knew that the documents eventually would be delivered to plaintiff in New York, they impliedly consented to the constructive agency of the Superintendent of Insurance.

This court cannot conclude that the mere fact that plaintiff mailed premium payments from New York provides jurisdiction over defendants. Section 59-a, subd. 2(a) specifically refers to acts "by an unauthorized foreign or alien movement." Admittedly, the court in Zacharakis v. Bunker Hill Mut. Ins. Co., 281 A.D. 487, 120 N.Y.S.2d 418 (1st Dept. 1953) indicated that payment of premiums by mail from New York to the insurer's manager in Philadelphia constitutes "collection of premiums." In the case at bar, however,

Calavo has failed to establish to whom it sent its premium payments (see Effron Affidavit ¶8), and this omission may indicate that the payments first were sent to its agent, Bain Dawes, and that actual payment by plaintiff was made from London or Belgium.[7/] Moreover, Zacharakis was decided five years before Hanson v. Denckla, 357 U.S. 235 (1958), in which the Supreme Court stated that the unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum state, and that it is essential that there be some act by which defendant purposefully avails itself of the privilege of conducting activities within the forum state. Id. at 253. See also Kulko v. California Superior Court, 435 U.S. at 93-94 (1978).

With regard to the issue of delivery, Calavo has failed to make a threshold showing that defendants directly mailed the certifi-

cates or cover notes into New York. At this state in the proceedings, the affidavits and pleadings must be viewed in the light most favorable to the non-moving party. See, e.g. Marketing Showcase, Inc. v. Alberto-Culver Company, 445 F. Supp. 755, 760 (S.D.N.Y. 1978); Ghazoul v. International Management Services, Inc., 398 F. Supp. 307, 309 (S.D.N.Y. 1975). Nevertheless, the court need not accept the often vague description of events in plaintiff's affidavits and ignore the uncontroverted evidence that none of the cover notes or certificates purport to come from the underwriters and are instead on the preprinted forms of Bain Dawes or Van den Bosch. Under these circumstances, plaintiff has failed to make a prima facie showing that defendants directly delivered them by mail.

Calavo alternatively argues that delivery to New York was made by Van den Bosch for the defendants. At this stage in the proceedings, defendants apparently do not chal-

lenge the assertion that the certificates were sent directly from Van den Bosch to the insured. They vehemently deny the existence of an agency relationship with Van den Bosch, however, and allege that Van den Bosch was contacted by Bain Dawes to act as plaintiff's broker.

Although the stationery of Van den Bosch identifies it as an "insurance broker," which is generally one acting on behalf of the insured, see Appleman, Insurance Law and Practice §8841 (West 1968), whether an insurance broker represents the insurers or the insured depends upon the circumstances of the particular case. See Price v. Lawrence-Van Voast, Inc., 58 A.D.2d 727, 396 N.Y.S.2d 296, 297 (3rd Dept. 1977). It is possible for a broker to become the agent of the insurer for certain purposes, such as for the collection of premiums and the delivery of the policy. 29 N.Y. Jur., Insurance, §426; 3 Couch on Insurance 2d, §25: 93 (1978). Moreover, a

formal agency relationship apparently is not necessary to impute the activities of Van den Bosch to underwriters. See Galgay v. Bulletin Co., Inc., 504 F.2d 1062, 1965 (2d Cir. 1974).

In this case, the certificates of insurance are on forms indicating that they came from Van den Bosch's offices. Plaintiff has submitted affidavits stating that Van den Bosch mailed the policies to Effron and that Van den Bosch was not its agent. Taken together, plaintiff has made out a prima facie case of delivery by defendants through Van den Bosch under section 59-a, subd. 2(a)(1) sufficient to defeat a motion for dismissal for lack of jurisdiction at this time.[8/]

C. Other Transaction of Business

Plaintiff alleges as an additional basis of jurisdiction that defendants, acting through their alleged agent, T & H, transacted business relevant to the insurance contract in the forum state. Specifically, T & H

received formal notice of claims in New York, instructed Effron regarding what to do with the figs, surveyed the damaged shipments, solicited bids for their resale, relayed these bids to the underwriters for their approval and recommended to Effron that the bids be accepted. All of this was done at plaintiff's request, but this request was required by the terms of the insurance certificates.

The stationery of T & H indicates that it is an agent of Lloyd's of London. It seems likely that it was designated as a claims agent at the suggestion of Bain Dawes, the Lloyd's broker. The affidavits reflect no ongoing relationship between T & H with the defendants and indeed, from the submission thus far, it appears likely that until T & H received notice of the claim from Effron, it had no idea that it was named in the certificates of insurance issued by Van den Bosch.

Although a formal agency relationship may not be required to impute the activities

of T & H to defendants for the purpose of establishing the requisite connection with New York, see Galgay v. Bulletin Company, Inc., supra, at 1065 (2d Cir. 1974), T & H's activities still are not of the sort that would make defendants subject to this court's jurisdiction. As was the case with the designated claims survey agent in Ringers' Dutchoes, Inc. v. S.S.S.L. 180, 494 F.2d 678 (2d Cir. 1974), T & H was authorized by the certificate of insurance to survey and report the amount of damages; it was not authorized to pay or reject claims or to negotiate settlements. The actual rejection of the claim, from which this cause of action arose, occurred in Belgium, and this activity appears to be the critical one. See also Naso v. National Union Fire Ins. Co., supra, at 613. Unlike the survey agent in Ringers, T & H also helped plaintiff dispose of the goods to minimize the loss. This activity is a natural incident of the type of services provided by the survey agent

in Ringer, however, and does not alter the conclusion that T & H is the "archetypal independent contractor." Ringers' Dutchoes, Inc. v. S.S.S.L. 180, supra, at 180-81.[9/] Plaintiff having failed to allege any additional facts from which it might be inferred that the appointment of T & H constitutes the requisite "purposeful activity" to sustain long-arm jurisdiction in the state, it has failed to make a showing of threshold jurisdiction on this claim.

II. Forum Non Conveniens

Under the principle of forum non conveniens, a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by statute. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507 (1947); Schertenleib v. Traum, 589 F.2d 1156, 1160 (2d Cir. 1978). Important considerations include relative ease of access to sources of proof, availability of compulsory process for atten-

dance of unwilling, and the cost of obtaining willing, witnesses, and all other practical problems that make trial of a case easy, expeditious and inexpensive. Unless the balance is strongly in favor of the defendant, however, the plaintiff's choice of forum should rarely be disturbed. 330 U.S. at 508.

In this action, the inconvenience to the defendants of defending the case in New York greatly outweighs plaintiff's interest in trying the action in this forum. All of the defendants are organized and have their principal places of business in Europe.[10/] Sixteen of the insurers do no business in New York. The policy was obtained by an insurance agent of plaintiff's located in London and was negotiated through Van den Bosch, a Belgian broker. Most of the documents relating to these negotiations are in Belgium.

Although the figs were shipped to New York and rejected there, the plaintiff has not disputed the findings of infestation by the

FDA or the assessment of damages by T & H. Rather, Calavo has alleged breach of contract and fraud, apparently claiming that the rejection insurance covered conditions arising prior to the shipment of goods as well as those arising during the shipment (complaint ¶41). These allegations may create factual issues as to the condition of the figs prior to shipment and the circumstances surrounding the making of the contract.

Such issues may require an inquiry into the condition of the figs in Turkey prior to their shipment, the intent of the parties, the representations made by their agents, and, possibly, the customs of the insurance industry in Europe. Critical to this inquiry is the testimony of Van den Bosch, which provides the sole basis for the court's jurisdiction over sixteen of the defendants and is the broker which ultimately negotiated the insurance contract. Unfortunately, Van den Bosch is not subject to this court's compulsory

process, nor is Bain Dawes, which received the initial instruction from Effron and apparently had continuing involvement with its attempts to secure insurance. In addition, with the exception of Herbert Effron and perhaps a representative of T & H, none of the essential witnesses are located in this jurisdiction.

Also to be considered is whether this case will require the application of foreign law. See generally Farmanfarmaian v. Gulf Oil Corp., 437 F. Supp. 910, 923 (S.D.N.Y. 1977), aff'd, 588 F.2d 880 (2d Cir. 1978). Belgium appears to be the jurisdiction which, "because of its relationship or contact with the occurrence of the parties has the greatest concern with the specific issue raised in the litigation." Babcock v. Johnson, 12 N.Y.2d 473, 481, 240 N.Y.S.2d 743, 749, 191 N.E.2d 279, 283 (1963). Plaintiff has framed the issues in terms of breach of contract and fraud. Since the contract was negotiated in

Belgium and any alleged fraud or breach of contract occurred there, Belgium has a substantial interest in how this action, involving its residents, is resolved. Moreover, there is an element of reliance that militates for the application of Belgian law because the defendants never left Europe or sought business in New York and did not know initially that the shipments of figs would be going to New York.[11/]

Finally, there is an alternative forum available to the parties,[12/] and an action is in fact going forward for a declaratory judgment in the Commercial Court of Antwerp. By dismissing the action in this court, the entire matter may be brought before the court in Antwerp,[13/] and needless duplication of proof and waste of judicial resources will be avoided. The interests of justice and the orderly progress of litigation is undoubtedly served by such a result.

Consequently, defendants' motion to

dismiss on the ground of forum non conveniens is granted. Settle order on notice within ten (10) days of the date hereof.

IT IS SO ORDERED:

/s/
Robert W. Sweet
U.S.D.J.

Dated: New York, New York
November 9, 1979

FOOTNOTES

1/ According to plaintiff, "rejection insurance" protects against the risk of a shipment's rejection by an importing country for failure to meet certain governmental health standards.

2/ Defendant General Accident Fire and Life Assurance Corporation Limited is authorized to do business in New York, and apparently no longer contests the adequacy of service upon it in this action. It has recently come to light that Assurances Generales is also authorized to do business in New York, and while similar service had not been made upon it at the time this motion was made, it was expected that such service would be perfected.

3/ T & H also denies that it was so authorized, and plaintiff apparently no longer is adhering to its earlier position. Consequently, T & H will only be considered insofar as its activities provide the court with jurisdiction under N.Y. Insurance Law §59-a, subd. 2.

4/ N.Y. Insurance Law §59-a, subd. 1 provides in part:

> The purpose of this section is to subject certain insurers to the jurisdiction of the courts of this state in suits by or on behalf of insureds or beneficiaries under certain insurance contracts. The legislature declares that it is a subject of concern that many residents of this state hold policies of insurance issued or delivered in this state by insurers while not authorized to do business in this

> state, thus presenting to such residents the often insuperable obstacle of resorting to distant forums for the purpose of asserting legal rights under such policies. In furtherance of such state interest, the legislature herein provides a method of substituted service of process upon such insurers and declares that in so doing it exercises its power to protect its residents and to define, for the purpose of this section, what constitutes doing business in this state. . . .

5/ N.Y. Insurance Law §59-a, subd. 2 provides:

> (a) Any of the following acts in this state, effected by mail or otherwise, by an unauthorized foreign or alien insurer: (1) the issurance [sic] or delivery of contracts of isurance [sic] to residents of this state or to corporations authorized to do business therein, (2) the solicitation of applications for such contracts, (3) the collection of premiums, membership fees, assessments or other considerations for such contracts, or (4) any other transaction of business, is equivalent to and shall constitute an appointment by such insurer of the superintendent and his successor in office, to be its true and lawful attorney, upon whom may be served all lawful process in any action, suit, or proceeding instituted by or on behalf of an insurer or beneficiary arising out of any such contract of insurance, and any such act shall be signification of its agreement that such service of process is of the same legal force and validity as personal service of process in this state upon such insurer.

6/ This argument was made by respondents and adopted by the lower court in Ford, and although the Court of Appeals never explicitly adopted this view, it analyzed the claim of jurisdiction in light of the "minimal contacts" text and found that such contacts were lacking.

7/ Plaintiff has not produced a bill or a check to indicate to whom the payments were made. Both of these documents should be in plaintiff's possession. Because it would have a much stronger argument for "collection of premiums" if a bill actually came to New York from defendants or their alleged agent, see text infra, it may be that these documents would reveal that the bill came from Bain Dawes or some agent of plaintiff's.

8/ Because a prima facie case of jurisdiction has been established, and because of the ultimate resolution of this motion, this court will not address plaintiff's argument that the court has jurisdiction over the defendants simply because they knew that the policy eventually would be delivered in New York. It is noted, however, that this position presses the court's jurisdiction to the outer limits of the due process clause. See Hanson v. Denckla, supra. See also Kulko v. California Superior Court, supra.

9/ Contrary to plaintiff's assertion, defendants did not agree to pay the costs in this case, the cover notes and certificates of insurance specifically provided that fees would be payable by the underwriters only in the event that the claims were honored.

10/ Fourteen of the defendants were incorporated in Belgium, two in the United Kingdom, one in France and one in West Germany.

11/ The cover note from Van den Bosch, signed by defendants, indicated that the shipments were "from Turkey to U.S.A." Prior to each shipment, Effron would forward the port of arrival to Bain Dawes in London, which in turn conveyed the information to the underwriters.

12/ The existence of an alternative forum, uncontested in this action, is a prerequisite to the application of forum non conveniens. See Gulf Oil Corp. v. Gilbert, 330 U.S. at 506-07; Schertenleib v. Traum, 589 F.2d at 1160.

13/ There has been no claim that plaintiff could not bring this action in Antwerp and it is assumed that because defendants have invoked the jurisdiction of the court in Antwerp, they will be subject to its jurisdiction in an action against them by Calavo. See generally Schertenleib v. Traum, supra, at 1160.